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In a recent series of U.S. court cases involving media ownership regulation, broadcasters have invoked the First Amendment to the U.S. Constitution to resist ownership limitations, while civil society organizations and critics of media consolidation have raised free speech rights as a rationale to promote the idea of ownership restrictions. This study reviews First Amendment jurisprudence on broadcast ownership regulation since the passage of the Telecommunications Act of 1996 (TCA) and explores the potential for a fundamental shift in how the U.S. federal courts allocate speech rights in broadcasting. While in dicta, the courts have remained consistent with pre-TCA landmark cases that recognized public interest concerns over broadcasters' individual speech rights, dissenting justices have empathized with broadcasters' argument that reducing ownership regulations is in the public interest. Informed by political economy, I argue that this nascent perspective should be rejected in accordance with a collectivist interpretation of the First Amendment.

The concern about free speech rights and broadcast ownership regulation is a significant one for those who study the political economy of communication; particularly as the U.S. broadcast industry continues to evolve from a highly regulated public trust to a deregulated commercial enterprise with world-wide reach through conglomerate parent ownership. In view of this, there appears to be the roots of a fundamental shift in how the U.S. federal courts may allocate speech rights in broadcast media in the future, moving away

from a collectivist interpretation of the First Amendment (that protects the public's right to receive a diverse array of viewpoints foremost) and towards an individualist one (that primarily favors the rights of broadcasters). Such a shift would be troubling, as it would assume that the government is the only entity capable of restricting speech in the media environment, thus neglecting the broadcaster's inherent position as gatekeeper. However, the U.S. Supreme Court has long recognized that this is not the case, especially in broadcast media. With a growing chorus of pressure from the lower federal courts, the analysis presented here will show that this long-standing recognition may soon be in danger of revision.

In spite of established precedent, broadcasters have often invoked the First Amendment as a rationale to resist various types of regulation of their industry, including ownership caps. Fox Television made this argument in court after its purchase of Chris-Craft Industries allowed the company to reach more national audience through its owned-and-operated stations than the law had then allowed. On February 19, 2002 the U.S. Court of Appeals for the District of Columbia overturned the Federal Communications Commission's (FCC) 1998 decision to retain the national broadcast ownership cap rule, and ordered that the FCC reconsider if the rule should be retained, and determine what circumstances would merit its retention.[1] The ruling was used by the Federal Communications Commission (FCC) to support its decision to further relax media ownership rules on June 2, 2003.[2]

The Philadelphia-based Prometheus Radio Project (on behalf of the Media Access Project, a civil society organization) challenged the FCC's rule changes, also citing free speech concerns, and the Third Circuit Court of Appeals in Philadelphia remanded key parts of those changes on June 24, 2004.[3] Although many broadcasters hoped that the Bush Administration would step in, neither the Justice Department nor the FCC challenged the Prometheus ruling. Subsequently, a group of media corporations, including Tribune Co., Fox, NBC Universal, and Viacom appealed the Third Circuit's decision to the Supreme Court, citing in part that their free speech rights were being violated.[4] On June 13, 2005 the Supreme Court declined to hear the appeals, thus letting stand the Third Circuit appellate court ruling that dismissed the FCC rule changes. Nonetheless, the conflicting claims about free speech and broadcast ownership regulation have been raised in the Fox Television Stations and Prometheus Radio Project cases have left the legality of broadcast ownership regulation on somewhat uncertain terms, while each side has called upon the federal courts for clarity.

In the case of broadcast ownership regulation and the First Amendment, this study questions whether there has been a shift in judicial discourse concerning the allocation of free speech rights to individual broadcasters and the collective public well being since the passage of the Telecommunications Act of 1996 (TCA).[5] That is, has federal jurisprudence on this matter been in accordance with legislative and administrative policymaking since the passage of the Act? If so, then a new era in broadcast policy has truly begun. If not, then the federal courts may inhibit the course of legislative enactments and FCC rulemaking. Or, has there been inconsistency within the federal courts since the passage of the 1996 Act about the appropriate relationship of free speech between broadcasters and the public, thus leaving the matter on uncertain terms?

In order to explore the jurisprudential discourse surrounding the debate between free speech and broadcast ownership regulation this study will first review the differing individualist and collectivist understandings of media laws, as well as the courts' application of the collectivist perspective in relevant cases involving broadcast media. Next, I will argue that the vantage point of political economy can elucidate critical concerns about the allocation of First Amendment rights between the public and broadcasters. I will then analyze U.S. federal court cases that resolved First Amendment issues related to broadcast ownership regulation since the passage of the TCA to determine whether the courts have found the First Amendment to be in favor of protecting the individual free speech rights of broadcasters from some regulatory infringement, or that the First Amendment protected the collective rights of citizens, thus justifying some form of ownership regulation. Additionally, the potential consequence of a fundamental shift in the federal courts about the underpinnings of First Amendment theory and the allocation of speech rights in broadcast media is discussed. Lastly, I will argue that the collectivist interpretation of the First Amendment should prevail in the matter of broadcast ownership regulation, and will refute the suggestion that ownership limits restricts the public's free speech rights.

Balancing collective and individual free speech rights in broadcasting

The conflicting claims about the nature of free speech rights between broadcasters and citizen groups represent one of the innermost debates in First Amendment theory. As Philip Napoli put it, that question is "whether the First Amendment is primarily intended to protect the speech rights of the individual or the speech rights and well-being of the citizenry as a collective."[6] The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[7] The individualist interpretation sees the First Amendment as a means to protect individuals from unjust governmental intrusion and preserving individual rights of self-expression. This reading is to some extent similar to absolutism, in that it places special emphasis on the "no law" passage of the First Amendment. However, not all absolutists agree on what exactly merits absolute protection. For instance, even the most noted absolutists, such as Alexander Meiklejohn and Hugo Black, suggested that commercial speech (e.g., advertising) did not merit the First Amendment protection that political speech enjoys.[8] Rather, as Robert McChesney put it, this brand of absolutism "has the core strength of keeping its eyes on the prize: democracy.[9] Being somewhat distinct, however, the individualist view of the First Amendment is means oriented in that it sees the preservation of individual rights to free expression as the best way to achieve all other goals associated with the First Amendment.[10] Broadcasters invoke the individualist perspective of the First Amendment when they resist media ownership regulation as restriction of their right to free speech.

Contrarily, a collectivist perspective rejects such an individualist interpretation

and would recognize (perhaps, more literally) that while Congress is barred from making laws that abridge free speech, it is not prohibited from enacting laws that create or enhance expression.[11] As such, a collectivist view of the First Amendment is ends oriented by focusing on the goal of the First Amendment to foster vibrant public discourse and self-governance. Therefore, if one believes that media ownership regulation enhances civic discourse within a society by allowing a wider range of viewpoints in broadcast programming, then it is well within the bounds of First Amendment jurisprudence.[12]

The jurisprudential distinction between the interests of the broadcasters (as individual speakers) and the collective interests of their audience (as citizens within a democracy) to receive speech also parallels a long terms struggle within political economy regarding an analytic focus on production, versus a focus on consumption. This debate was most fractious in the mid-1990s within the larger realm of critical research, between scholars representing political economy and cultural studies.[13] While the broader debate became rancorous at times, Peter Golding and Graham Murdock provided a more dispassionate and productive assessment of these analytic traditions in propounding a "critical" political economy approach to communication study.[14] Golding and Murdock identify a significant weakness in the cultural studies approach that only focuses on audience interpretation of media texts because it can easily be conflated as "untrammeled consumer choice" and thus ignore "the ways in which people's consumption choices are structured by their position in the wider economic formation."[15] Rather, as Golding and Murdock go on to explain, a "critical" view of political economy should be especially interested in the ways that communicative activity is produced and "structured by the unequal distribution of material and symbolic resources."[16] As McChesney explained, one of the primary distinctions of political economy is

> its explicit commitment to participatory democracy. Research is driven by a central premise drawn directly from classical democratic political theory: the notion that democracy is predicated upon an informed participating citizenry, and that a political culture typified by an active and informed citizenry can only be generated in final analysis by a healthy and vibrant media system.[17]

This goal of political economy is in accord with a collectivist interpretation of the First Amendment, and directs further attention to media ownership and government regulation of media institutions.

Napoli pointed out that while scholars such as Stanley Ingber[18] and Robert Post[19] have described the U.S. Supreme Court as interpreting the First Amendment within the individualist framework, the Court has also clearly asserted a collectivist perspective as it relates to broadcasting. This is consistent with the Communications Act of 1934, which granted the authority to regulate broadcasting in the "public interest, convenience, and necessity."[20] The U.S. Supreme Court in its 1969 decision in Red Lion Broadcasting Co. v. F.C.C. explicitly stated: "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[21]

The Court's acknowledgement of the collective interest of citizens to receive a diverse array of viewpoints and opinions through a scarce public resource was congruent with its opinion in two other landmark First Amendment cases. In Associated Press v. U.S. case in 1945, the Court said that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[22] Although the Court's opinion in this case was directed to the print medium, it clearly posited that protecting the collective welfare of the public as a goal of the First Amendment. Moreover, the Court explicitly recognized that non-governmental interests (e.g., private corporations) may infringe the public's freedom of speech by restraining its ability to receive a diverse array of news and information.

> Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.[23]

Again, the Supreme Court issued this opinion in the context of the print medium, which has enjoyed some of the fullest individual First Amendment protections; unlike broadcasting, which has historically had the least of such individual liberty due to the dual notions of spectrum scarcity and public interest obligations. Accordingly, if the Court is loathe in entertaining the argument that private interests have any constitutional immunity from ownership regulation in the print medium, then it would certainly be even less inclined to accept this rationale in the broadcast realm.

In the 1943 National Broadcasting Co., Inc., et al. v. United States decision the Court, in dismissing the broadcast network's claim that their First Amendment rights were infringed by ownership regulation, had also recognized the greater collective interest of the public over the individual liberty of broadcasters by stating, "The 'public interest' to be served under the Communications Act is thus the interest of the listening public in 'the larger and more effective use of radio.'"[24]

From these cases, it seemed that the collectivist interpretation of the First Amendment, especially as it applies to broadcasting, was firmly fixed in federal jurisprudence. However, there has been concern among political economists since the passage of the TCA that the FCC's media ownership policies are in contrast with such First Amendment jurisprudence.[25] Moreover, how the U.S. federal courts distinguish the First Amendment, as a protection of the individual rights of broadcasters, or the collective well-being of the citizenry since the passage of the 1996 Act may have a significant impact upon the future shape of broadcast ownership regulation in the United States.

The political economy of recasting First Amendment rights between broadcasters and the public: Neoliberalism and its discontents

Recasting First Amendment protection from the collective welfare of the public to the individual liberties of media owners has been an integral component of the arguments made by the proponents of decimating media ownership caps. As will be discussed here, this line of reasoning clearly fits within a broader neoliberal agenda to facilitate "the flow and accumulation of capital for a relatively small number of private interests," while also averting public interest regulations.[26] Neoliberalism is the fundamental belief that state power should be limited in favor of an enhanced private sphere (constituted by free markets and private property), and this philosophy can be seen where lawmakers have steadily treated the U.S. broadcast industry less like a regulated public trust and more like a purely commercial enterprise that should be mostly freed from government constraint.

The beginning of this course was marked by Mark Fowler and Daniel Brenner's classic law review article in 1982 that propounded a market-based approach to broadcast regulation,[27] and was steadily implemented in Fowler's chairmanship of the FCC during the Presidential Administration of Ronald Reagan, as well as throughout subsequent administrations during the 1980s and 1990s. Over this time period the FCC rescinded the Fairness Doctrine and steadily relaxed media ownership rules. The process reached its pinnacle moment with the passage of the TCA, which, as McChesney described,

> laid down the core values for the FCC to implement for generations. The operating premise of the law was that new communication technologies combined with an increased appreciation for the genius of the market rendered the traditional regulatory model moot. The solution therefore was to lift regulations and ownership restrictions from commercial media and communication companies, allow competition in the marketplace to develop, and reduce the government's role to that of protecting private property.[28]

As Patricia Aufderheide also explained, the TCA represented the "ideological architecture of a new era in communication policy" and put forth a guiding neoliberal philosophy that had been "evolving in regulatory practice over the past two decades, with much contestation in the courts."[29]

Broadcasters have continually pursued such a regulatory structural change, along with the recasting of First Amendment rights and how they apply to broadcasters and the public.[30] As McChesney described, media industries have argued for decades that "free market competition and new technologies eliminated the need for public interest regulation," and thus, violated their First Amendment rights.[31] Although broadcasters have not yet convinced the courts that ownership rules are an unconstitutional abridgement of their speech rights, passage of the TCA showed that their desire for neoliberal economic policy had congealed within the FCC and Congress. As many works have demonstrated, the electronic media industries have

"captured" the FCC[32] while also brandishing enormous influence within Congress. [33] As such, the policy endeavors undertaken by Congress and the FCC are mostly inseparable from communication industries influential lobbying and media platforms.

The same media industries that have asserted an individualist interpretation of the First Amendment are also the ones who designed the neoliberal architecture adopted by Congress in the TCA and set to be built by the FCC. For instance, Title II, Section 202(h) of the TCA requires the FCC to review its ownership rules to determine **"**whether any of such rules are necessary in the public interest as a result of competition." After passage of the TCA, the broadcasters argument continued to be catered to by FCC Chairman Michael Powell during his agency's third biennial review of media ownership rules[34] that lead to the 2003 Report and Order relaxing several ownership concentration protections.[35] In its review under Chairman Powell's guidance, the FCC narrowed its analytic perspective to the economic aspects of media ownership rules, while ignoring many other concerns raised by the broader public, thereby gratifying the wishes of industry stakeholders.[36] As McChesney noted, Powell was a clear proponent of extending the First Amendment rights of broadcasters, which involved "unvarnished praise for free markets."[37] This was, perhaps, best evidenced by Chairman Powell's remarks before the Media Institute in 1998 when he criticized the Supreme Court's jurisprudence on the matter.[38] However, Powell's desire to reshape broadcast ownership policy while transforming the rhetoric about 'public interest' into 'competition under anti-trust laws' may have ignored First Amendment jurisprudence about the collective rights of citizens in a democracy, and thus, set the stage for legal challenges in federal court.

While neoliberal economic philosophy embedded with Congress and the FCC has called for an individualist interpretation of the First Amendment, the analysis presented here questions whether the federal courts would agree with this understanding of free speech, especially given the Supreme Court's disposition for a collectivist interpretation in broadcast media (as discussed in the previous section). Although, the legislature has the authority to enact statutes under the U.S. Constitution, and may even delegate parts of its lawmaking authority to administrative agencies that it has created (such as the FCC), questions about the proper interpretation, application and Constitutionality of those laws are ultimately decided within the federal courts. Therefore, it is significant to consider how the federal courts have assessed the individualist interpretation of the First Amendment espoused by communication businesses as speakers, versus the collectivist interpretation concerned with the rights of citizens within a democracy to receive speech. From the critical orientation of political economy, it would be of further importance to understand the federal courts' discernment of the neoliberal economic logic that has been employed by Congress and the FCC, against any counter moral rationale of fairness over economic efficiency.

Scholars from the milieu of political economy have long questioned the neoliberal policy shift, and it impact on the future structure of broadcast ownership, as well as the implications of that structure for the free flow of ideas, news and information.[39] Such concern is raised by the very essence of political economy's moral philosophical outlook,[40] which "goes beyond technical issues of efficiency to en-

gage with basic moral questions of justice, equity, and the public good."[41] From his extensive quantitative and qualitative examination of the subject, Mark Cooper concluded that ownership rules, which limit "merger activity to a small number of markets is well justified on the basis of empirical data, statutory language and Supreme Court jurisprudence."[42]

Similarly, Vincent Mosco noted the significance of such changes when they occurred within the North American telecommunication industry.[43] Citing his earlier work[44] and that of Kevin Wilson,[45] Mosco noted that "political economists have examined the changes in discourse that accompany structural changes, specifically by exploring the roots of a shift in the dominant rhetoric from that of 'public' service provided by regulated monopolies to 'cost-based' service offered by market competitors."[46] Eileen Meehan, Mosco and Janet Wasko have also explained that

> political economy's grounding in history, moral philosophy, social totality, and praxis orients researchers to the study of social change through economic restructuring. The integration of historical, social, and analytic methods provides tools to uncover and explain structural continuity and structural change.[47]

Accordingly, this study blends political economy's moral philosophical outlook with legal analysis to explore the judicial discourse concerning the allocation of free speech rights between individual broadcasters and the public since the passage of the TCA. The following questions are considered in the analysis: Has federal jurisprudence been consistent with pre-TCA landmark cases? Has there been inconsistency within the federal courts since the passage of the TCA about the appropriate relationship of free speech between broadcasters and the public? What implications can be drawn from federal court dicta and dissenting opinions about free speech and broadcast ownership since the passage of the TCA?

Examining federal jurisprudence on broadcast ownership and the First Amendment

In order to identify all federal jurisprudence on broadcast ownership regulation and the First Amendment since the passage of the TCA, the author consulted Westlaw's online legal research service that provides access to U.S. statutes and case law materials. The researcher used Westlaw's "key search" method that comprehensively classifies case law. Under "key search" classifications of "communications," "free speech" and "telecommunication," the author did a Boolean search of all federal cases using variants of the terms "broadcast ownership" and "First Amendment." A total of 22 cases were identified, of which seven were decided after passage of the TCA. Of those seven, three cases (all of which were decided at the circuit court level) specifically addressed First Amendment claims about the FCC's decision to enforce broadcast ownership rules pursuant to the TCA. As such, those cases (Prometheus Radio Project v. F.C.C., 2004; Sinclair Broadcast Group, Inc. v.

F.C.C., 2002;[48] and Fox Television Stations, Inc. v. F.C.C., 2002) comprised the focus of this analysis.

The remaining four cases addressed a wider array of issues. Ruggiero v. the F.C.C. (2003)[49] regarded the FCC's enforcement of the Radio Broadcasting Preservation Act of 2000 (RBPA) that prohibited anyone who operated an unlicensed radio station from obtaining a low power FM license; Time Warner Entertainment Co., L.P. v. F.C.C. (2001)[50] concerned ownership restrictions on cable operators (not over-the-air broadcasters); Arkansas Educ. Television Com'n v. Forbes (1998) [51] involved a state-owned public television broadcasters exclusion of a political candidate from a televised debate; and BellSouth Corp. v. F.C.C. (1998)[52] considered a regional bell operating company's challenge of a statute limiting its ability to provide electronic publishing. Because these four cases were not directly relevant to this issue at hand, they were each excluded from further analysis.

For the three cases that are the focus of this analysis (Fox Television Stations, Inc. v. F.C.C., 2002; Sinclair Broadcast Group, Inc. v. F.C.C., 2002; and Prometheus Radio Project v. F.C.C., 2004) the author performed a "key cite" reference check on Westlaw, which as part of its legal reporting service monitors all cases and provides an up-to-date status on the binding legal authority of cases. Both the Fox Television and Sinclair Broadcast cases contained just the same two negative citing references. One negative reference was from the court decision in Cellco Partnership v. F.C.C. (2004),[53] which was only distinguished by a different set of facts in the case. In Cellco Partnership, the court did not resolve any First Amendment claims, or broadcast ownership regulations, as the case involved telephone services. Moreover, the U.S. Court of Appeals for the District of Columbia Circuit that decided the Cellco Partnership case was also the same court that decided the Fox Television and Sinclair Broadcast cases, so the decision represents no conflict among the circuits. The other negative citing reference came from the Third Circuit Court of Appeals in the Prometheus decision. Here, the Prometheus court provided a slightly different framework for its opinion, and that decision is analyzed later as part of this study. All other citing references to the Fox Television and Sinclair Broadcast decisions were positive, and the Prometheus decision contained no negative citing references. Therefore, the three cases analyzed as part of this study represent an authoritative jurisprudential perspective on federal broadcast ownership regulation and the First Amendment.

Additionally, a brief instrumental analysis of John Roberts appointment as Chief Justice of the U.S. Supreme Court is provided herein to examine the potential impact that a newly shaped Supreme Court may have on future litigation. As Meehan, Mosco and Wasko described, instrumental analysis "traces the personal and business networks within institutions" relying on several sources for data, including "government documents, required corporate disclosures, trade journals" and the like.[54] The fact that John Roberts served as a counsel for broadcasters in one of the cases examined in this analysis, as well as his financial interests in Disney, which holds broadcast licenses, deserves at least some elucidation here.

Broadcast ownership and free speech after the Telecommunications Act of 1996

The Prometheus, Sinclair and Fox decisions will be analyzed in chronological order. After providing a brief summary of the facts and legal history for each case, the author will then examine the holding, paying particular attention to the court's assessment of free speech rights for broadcasters vs. the public. Accordingly, Fox Television Stations, Inc. v. F.C.C. is the first case to be analyzed.

As noted earlier, Fox Television Stations brought suit over the FCC's decision to retain the National Television Station Ownership (NTSO) rule. The case came before the Court of Appeals for the District of Columbia among five consolidated petitions regarding media ownership rules. Fox Television claimed that the FCC's decision to retain the NTSO rule was a violation of the Administrative Procedure Act (APA), the TCA and the First Amendment to the U.S. Constitution. While the court determined that the FCC's decision not to repeal the NTSO rule was arbitrary and capricious, thus violating the APA, and in violation of the TCA, it found that the rule did not violate broadcasters First Amendment rights.

In its decision to remand the NTSO rule back to the FCC for further review, the Fox court still recognized that "the public interest" in broadcast regulation has embraced both "diversity" and "localism," and therefore, the question "is whether the Commission adequately justified its retention decision as necessary to further diversity and localism."[55] While the court found that rationale offered by the FCC to retain the rule was insufficient and did not demonstrate its necessity to support the public interest, it nonetheless recognized the values of 'diversity' and 'localism' as part of the 'public interest' mandate, each of which are collectivist goals of the First Amendment.

Moreover, in dismissing the First Amendment claim brought by Fox Television, the court said that broadcasters had not shown any compelling reason why it should abandon precedent established by the Supreme Court in F.C.C. v. National Citizens Committee for Broadcasting,[56] Red Lion Broadcasting Co. v. F.C.C., and National Broadcasting Co. v. U.S. Although the court agreed that the FCC had done an insufficient job of justifying the NTSO rule, it said that such a rule could still be constitutionally valid under the First Amendment. As such, the Fox court's explanation deserves to be quoted at length:

> This paean to the undoubted virtues of a free market in television stations is not, however, responsive to the question whether the Congress could reasonably determine that a more diversified ownership of television stations would likely lead to the presentation of more diverse points of view. By limiting the number of stations each network (or other entity) may own, the NTSO Rule ensures that there are more owners than there would otherwise be. An industry with a larger number of owners may well be less efficient than a more concentrated industry. Both consumer satisfaction and potential operating cost savings may be sacrificed as

> a result of the Rule. But that is not to say the Rule is unreasonable because the Congress may, in the regulation of broadcasting, constitutionally pursue values other than efficiency -- including in particular diversity in programming, for which diversity of ownership is perhaps an aspirational but surely not an irrational proxy. Simply put, it is not unreasonable – and therefore not unconstitutional – for the Congress to prefer having in the aggregate more voices heard . . . . [57]

The D.C. court may have been sympathetic to the economic argument being forwarded by broadcasters, but nonetheless, respected the Congress' prerogative to support collectivist goals of the First Amendment, as well as the Supreme Court's interpretation of its constitutional validity.

Sinclair Broadcasting's suit was also decided in the Court of Appeals for the District of Columbia in 2002 as the company challenged the FCC's adoption of a new Local Ownership Order, which allowed common ownership of two television stations in a single market provided that one of the stations is not among the four highest ranked stations and that eight independently owned, full-powered stations existed in the market after the merger. Sinclair disputed the Order on grounds that (1) the eight independent voices limit was arbitrary and capricious, (2) failing to fully grandfather existing local marketing agreements (that allowed a television station or other entity to manage programming, sales, and operations at another station) violated the TCA, and (3) the restriction violated the First Amendment.

The Sinclair court held that the FCC had not provided sufficient justification for counting fewer types of voices in the local ownership rule, which only included broadcast media, compared to the agency's rule on cross-ownership of radio and television stations that included newspapers and cable systems in addition to broadcasting outlets. Therefore, the court remanded the case back to the FCC to reconsider its definition of voices in conjunction with its numerical limits. Additionally, the court found that limits for grandfathering local market agreements did violate the TCA. Lastly, the court rejected Sinclair's First Amendment challenge.

In rejecting Sinclair's First Amendment claim, the majority held that

> 'there is no unabridgeable First Amendment right comparable to the right of every individual to speak, write, or publish' to hold a broadcast license . . . Sinclair does not have a First Amendment right to hold a broadcast license where it would not, under the *Local Ownership Order*, satisfy the public interest.[58]

Moreover, the majority relied on the Supreme Court's decision in F.C.C. v. National Citizens Committee for Broadcasting to uphold

> an ownership restriction analogous to the *Local Ownership Order*, based on the same reasons of diversity and competition . . . in recognition that such an ownership limitation significantly furthers the First Amendment interest in a robust exchange of viewpoints.[59]

Thus, the court found Sinclair's complaint that the decision in F.C.C. v. National Citizens Committee for Broadcasting no longer applicable with the development of cable television, direct broadcast satellite and the Internet was "to no avail."[60] By invoking the 'public interest' rationale in its holding, as well as its explicit statement that ownership limitation furthers 'the First Amendment interest in a robust exchange of viewpoints,' it is clear that the majority in this case respected the collective free speech rights of the public over the individual First Amendment liberties of broadcasters.

However, Justice Sentelle filed a dissenting opinion on the First Amendment matter. While conceding that it was not the place of his court to reject the established precedent of the Supreme Court on this matter, Sentelle did strike a tone of activism when he stated:

> Perhaps with now-Chairman Powell's announcement that the 'time has come to reexamine First Amendment jurisprudence as it has been applied to broadcast media and bring it into line with the realities of today's communications marketplace,' the Supreme Court will take notice.[61]

Sentelle cited Chairman Powell's 1998 speech before the Media Institute noted earlier in this analysis.[62] Indeed, Powell's efforts while Chair of the FCC to further diminish broadcast ownership rules was consistent with his belief that broadcasters should be afforded more individual First Amendment protections over the collective free speech concerns of the public. The rule changes Powell instituted in 2003 set the stage for the next court challenge.

After the FCC rule changes were announced on June 2, 2003, several public interest and consumer advocacy groups petitioned for judicial review of the order. Several media associations and broadcasters also challenged the order, some claiming that some of the revisions and the nonappearance of further deregulation violated the TCA. The appeals were consolidated into the case of Prometheus Radio Project v. F.C.C. and heard before the Third Circuit Court of Appeals in Philadelphia, PA in 2004. While the court affirmed several parts of the FCC's order, it found that the agency's

> derivation of new Cross-Media Limits, and its modification of the numerical limits on both television and radio station ownership local markets, all have the same essential flaw: an unjustified assumption that media outlets of the same type make an equal contribution to diversity and competition in local markets.[63]

Therefore, the court issued a remand that the FCC needs to reconsider its approach to setting numerical limits.

In resolving the First Amendment claims, the Prometheus court addressed the pro-deregulatory petitioners claim that

> restrictions on the common ownership of newspapers and broadcast stations contravenes the First Amendment because it limits the speech opportunities of newspaper owners and broadcast stations owners, and hence limits the public's access to information.[64]

Interestingly, media owners had not only asserted their First Amendment rights, but attempted to link their individual liberty to the collective welfare of the public's access to information. However, the court was not swayed and declined the opportunity to disregard the established precedent of the Supreme Court, noting that the high court "has said that limiting common ownership is a reasonable means of promoting the public interest in viewpoint diversity."[65]

However, Chief Judge Scirica agreed with the pro-deregulatory petitioners in a separate opinion that dissented in part and concurred in part with the majority's opinion. Scirica said that the FCC's decision to repeal national ownership caps for television and radio broadcasting recognized the "potential economic efficiency gains from 'group ownership actually further . . . rather than frustrate . . . the foremost First Amendment goal of augmenting popular discussion of important public issues.'"[66] Scirica's linkage of individual freedoms afforded to broadcasters and the collective public good is clear.

Roots of change in First Amendment jurisprudence on broadcast ownership regulation?

While in dicta the D.C. Circuit Court may have been sympathetic with the neoliberal economic arguments forwarded by broadcasters, and may even disagree with the Supreme Court's refusal to reconsider the matter, it has nonetheless respected the prerogative of Congress and the supremacy of the high court. While the FCC and Congress may be more prone to political pressure in the U.S. communication policymaking system, the federal courts are called to adjudicate consistent with the principles and precedents established by the Supreme Court.

However, one may wonder how long the Supreme Court may let current precedent stand if there is a growing chorus of pressure from broadcasters, the FCC and lower courts for it to reevaluate the philosophical underpinnings of this specific area of law. Although, the majority opinions from the D.C. Circuit ultimately upheld Supreme Court precedent, two dissenting opinions were clearly in support of the broadcasters assertions and have suggested the high court should reconsider. Even though the Supreme Court refused the opportunity to take appeals from the Third Circuits decision in Prometheus v. F.C.C., it is likely that broadcasters will continue to forward the First Amendment argument on subsequent appeals, providing the high court with future opportunities to reshape jurisprudence in this area. Perhaps, this opportunity may come about, as the Supreme Court itself is reshaped.

With the passing of William Rehnquist in 2005, John Roberts joined the Supreme Court as the new Chief Justice. Another new appointee, Samuel Alito,

joined the Court in 2006 with the retirement of Sandra Day O'Connor. If they are so inclined, the two new justices may have an effect on the Court's decision to grant certiorari for a case that involves the key question dealt with in this analysis, especially since one is the Chief Justice. It is the Chief Justice who compiles the "discuss list" from the certiorari petitions each week for the Court's weekly meeting "based upon his own review and suggestions from other Justices."67 It then takes four justices to agree to grant certiorari.

Moreover, prior to his appointment to the Supreme Court, Chief Justice Roberts served as a counselor for the petitioners in Fox Television Stations, Inc. et al v. FCC, a key case that was analyzed earlier in this study. Part of the petitioner's argument in that case was the idea that ownership rules restricted the free speech rights of broadcasters by prohibiting them "from exercising their editorial discretion to select and provide the video programming of their choice in the localities of their choice and to the audience of their choice."68 Roberts' work on this case, his personal financial interests in media companies such as Disney (which holds broadcast licenses), Time Warner, and Blockbuster,69 as well as his representation of other corporate media clients while a partner at Hogan & Hartson law firm has raised concern among civil society organizations about the impact he may have on the U.S. media environment in the position of Supreme Court Chief Justice. As the Center for Digital Democracy asked:

> As a defender of the 'free speech' rights of media corporations, what are Judge Roberts views on the role of ownership policy to protect and enhance the First Amendment rights of the public?70

Based on the arguments made in Fox Television Stations, Inc. et al. v. FCC, it may appear that Roberts would favor the individual First Amendment rights of broadcasters, over the collective free speech interests of the public in future adjudications involving broadcast ownership regulation. However, this position would be a dramatic shift for the Supreme Court, which is tasked with providing concentrated attention to such constitutional issues. In its most recent opportunity to hear the issue in the Prometheus case that came before Roberts' arrival, the Supreme Court did not grant certiorari. Perhaps, this is because the broader First Amendment issue within the individualist/collectivist debate has been sufficiently addressed by the lower federal courts in accordance with long-standing Supreme Court precedent.

Conclusion: Individual and collective free speech rights in broadcasting

From the majority opinions expressed in the three cases examined here (Fox Television Stations, Inc. v. F.C.C., Sinclair Broadcast Group, Inc. v. F.C.C., and Prometheus Radio Project v. F.C.C.) it is evident that federal jurisprudence on broadcast ownership regulation and free speech since the passage of the TCA has remained congruent with established Supreme Court precedent from the pre-TCA landmark

cases (National Broadcasting Co., Inc. et al. v. United States, Associated Press v. U.S., and Red Lion Broadcasting Co. v. F.C.C.), thus favoring the collectivist interpretation. However, as also found in this study, a persuasive rhetorical device that may affect any reconsideration by the Supreme Court on the matter is the linkage of group ownership of media outlets as ***fostering*** the public's collective right to information, and hence, the characterization of ownership limits as a restriction of the ***public's*** free speech rights.

Nevertheless, this First Amendment analysis from the standpoint of political economy disagrees with the perspective that ownership regulations violate the individual speech rights of broadcasters, and that speech rights of the collective are best served by removing ownership restrictions. Rather, as the federal courts have maintained in the post-TCA cases examined here, the First Amendment protects the public interest foremost in broadcasting, even over that of the broadcasters who purport to serve that interest. It is evident that the federal courts in assessing free speech rights after the TCA have remained true to the principle set out in Associated Press v. U.S.: "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."[71] Thus, even from the 'individualist' perspective of the First Amendment, it could be argued that the protection of speech rights of individual human beings is paramount to that of individual corporate entities.[72] As such, Maria Simone and Jan Fernback have observed that regulation that encourages "extensive selection and distribution of individual expressions, are in keeping with the First Amendment, not opposed to it."[73] Individual expressions in this case, mean that of individual human beings.

Furthermore, from the vantage point of political economy, the idea that ownership regulation restricts the public's free speech rights is a sophistic notion. As Oscar Gandy noted while outlining political economy's critique of neoclassical economics:

> Far too frequently the consumer must rely upon the self-serving information provided by the producer or distributor of goods who has an interest in hiding some qualities, while placing other attributes up front and center.[74]

While further relaxation (or elimination of) broadcast ownership rules would result in greater economies of scale wherein the remaining ownership groups might promise enhanced news and information services, along with expanded variety in its entertainment programming, it still neglects the issue of diversity. The value of diversity is more than just consumer-choice within a defined market. Rather, as Robert Horwitz remarked, in drawing upon Theodore Glasser's analysis,

> [d]iversity is ensconced within the values which underlie the freedom of speech, values which demand divergent points of view both because they nurture an informed, self-governing citizenry and because they promote cultural pluralism.[75]

Therefore, a variety of television networks, genres and formats do not have the same essence as diversity of voices, which is a human quality. However, if that distinction were to become lost upon the high court, it may well produce a new legal precedent in affording First Amendment rights to broadcasters and the public. Moreover, such a precedent would essentially allow corporate media the power of censorship via exclusion. Corporate interests will not necessarily tolerate the diverse array of viewpoint that democracy needs to flourish.

Even more than illustrating how the long-standing conflict between collectivist and individualist interpretations of the First Amendment has become a focal point in broadcast ownership regulation, this debate ultimately challenges us to ask the most vital questions about the purpose of free speech in a democracy: Is its primary function only to preserve the individual rights of citizens from infringement by the government? Or, is intended to protect the citizenry's speech liberties from infringement by any entity (government or private)? While Supreme Court precedent has clearly established that in broadcast media it is the latter, this study has shown that future challenges brought by broadcasters, along with dissenters in the federal circuit courts and a reshaped a high court may soon change the answer. Meanwhile, the critical perspective of political economy beckons us not to ignore the inherent power of broadcast entities to determine what so many hear and see over the public's airwaves. Armoring broadcasters with constitutional immunity from ownership regulation would allow them unrestricted power to censor speech over an important public resource. Meanwhile, scholars of First Amendment jurisprudence and political economy should reject this nascent idea that the relaxation of broadcast ownership rules represents the public's right to speech.

Notes

1. *Fox Television Stations, Inc .et al. v. F.C.C.,* 280 F.3d 1027 (2002).
2. *Report and Order,* MB Docket No. 02-277, et al., FCC 03-127 (2003, June 2).
3. *Prometheus Radio Project vs. F.C.C.,* 373 F.3d 372 (2004).
4. See *National Association of Broadcasters v. FCC*, No. 04-1003, petition for certiorari filed to U.S. Supreme Court (January 31, 2005).
5. *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996).
6. Philip Napoli, *Foundations of Communications Policy: Principles and Process in the Regulation of Electronic Media* (Cresskill, NJ: Hampton Press, Inc., 2001), 44.
7. *U.S. Constitution*, amendment I.
8. See Robert W. McChesney, "The New Theology of the First Amendment," *Monthly Review* 49:10, 1998, http://www.monthlyreview.org398rwm.htm (accessed September 18, 2006).
9. Id.
10. Napoli at 30-52.
11. Id.

12. See Jerome Barron, *Freedom of the Press for Whom? The Right of Access to Mass Media* (Bloomington, IN: Indiana University Press, 1973), 209-210 .
13. For an overview of this debate see Eileen Meehan, "Commodity, Culture, Common Sense: Media Research and Paradigm Dialogue," Journal *of Media Economics* 12:2 (1999), 149-163.
14. Peter Golding and Graham Murdock, "Culture, communication, and political economy," in *Mass Media & Society* 2nd edition, eds. James Curran and Michael Gurevitch (London, England: Edward Arnold, 1996), 11-30.
15. Golding and Murdock 1996 at 13.
16. Id at 14.
17. Robert W. McChesney, "What is the Political Economy of Communication?", *Democratic Communiqué*, 16:1 (1998), 8.
18. Stanley Ingber, "Rediscovering the communal worth of individual rights: The First Amendment in institutional contexts," 69 *Texas Law Review*, (1990) 1-108.
19. Robert Post, "Meiklejohn's mistake: Individual autonomy and the reform of public discourse," 63 *University of Colorado Law Review*, (1993) 1109-1137.
20. *Communications Act of 1934*, Pub. L. No. 416, 48 Stat. 1064 (1934).
21. *Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367 at 395 (1969).
22. *Associated Press v. U.S.,* 326 U.S. 1 at 20 (1945).
23. Id at 20.
24. *National Broadcasting Co., Inc., et al. v. United States,* 319 U.S. 190 at 216 (1943).
25. See Mark Cooper, *Media Ownership and Democracy in the Digital Information Age: Promoting Diversity with First Amendment Principles and Market Structure Analysis* (Washington, DC: Gillis Publishing Group, 2003); and Robert W. McChesney, *The Problem of the Media: U.S. Communication Politics in the 21st Century* (New York, NY: Monthly Review Press, 2004). Cooper's analysis was based on a broad mix of scholarship and case law throughout the history of broadcasting, and did not include the *Prometheus Radio Project vs. F.C.C.* (2004) decision. However, the analysis presented in this study focuses exclusively on federal court jurisprudence about First Amendment freedoms related the FCC's enforcement of broadcast ownership rules after passage of the TCA.
26. Victor Pickard, "Neoliberal Visions and Revisions in Global Communications Policy from NWICO to WSIS," *Journal of Communication Inquiry* 31:2 (2007), 121.
27. Mark S. Fowler and Daniel L. Brenner, "A marketplace approach to broadcast regulation,"60 *Texas Law Review*, no. 2, 207-257 (1982).
28. McChesney 2004 at 51.
29. Patricia Aufderheide, *Communications Policy and the Public Interest: The Telecommunications Act of 1996*, (New York, NY: The Guilford Press, 1999).
30. McChesney 2004 at 48-51.
31. Id at 50.
32. See Barry Cole and Mal Oettinger, *Reluctant Regulators: The FCC and the Broadcast Audience*, (Reading, MA: Addison-Wesley, 1978); and John Dun-

bar, "Who is watching the watchdog?" in *The Future of Media: Resistance and Reform in the 21st Century*, eds. Robert W. McChesney and Ben Scott (New York: Seven Stories Press, 2005), 127-140.

33. See the Center for Public Integrity report, *Networks of Influence: The Political Power of the Communications Industry*, (Washington, DC: Public Integrity Books, 2005); and J. H. Snider, *Speak Softly and Carry a Big Stick: How Local TV Broadcasters Exert Political Power*, (New York, NY: iUniverse, Inc., 2005).
34. See *Notice of Proposed Rulemak*ing, MB Docket No. 02-277, et al., FCC 02-249 (September 12, 2006). The FCC initiated review of the following ownership rules: the National Television Station Ownership (NTSO) rule, which prohibited any entity from owning television stations with a combined audience reach that exceeds 35 percent of U.S. television households; the Local Television Multiple Ownership (LTMO) rule, which limited a single entity to owning no more than two television stations in a given market; the Radio-Television Cross-Ownership (RTCO) rule**,** which restricted a single entity to owning no more than two television stations and six radio stations in a given market (depending upon size); and the Dual Network (DN) rule, which prohibited a combination of two or more major broadcast networks (ABC, CBS, NBC and Fox). However, the rule does allow for a single entity to own both a major network and a minor one. For example, the rule permitted Viacom to own both CBS (a major broadcast network) and UPN (a minor network). In the its review, the FCC also sought comment on three previously initiated proceedings regarding the cross-ownership of broadcast stations and newspapers, multiple ownership of radio stations, and the definition of radio markets.
35. After its review the FCC announced on June 2, 2003 significant changes to three of the four ownership rules mentioned previously. The NTSO cap was raised to 45 percent. The LTMO was changed to permit one entity to own three stations in large markets and two stations in others. The RTCO rule was altered so that cross-ownership of newspaper and television or radio stations would be allowed in large markets, and would also permit some combinations in mid-size markets. The DN rule was left unchanged. Additionally, the FCC announced that it would adapt Arbitron's system for defining radio markets, although it left the limits on radio ownership unchanged. See *Report and Order*, MB Docket No. 02-277, et al., FCC 03-127 (June 2, 2003).
36. See Jeffrey L. Blevins and Duncan H. Brown, "Political Issue or Policy Matter? The U.S. Federal Communications Commission's Third Biennial Review of Broadcast Ownership Rules," *Journal of Communication Inquiry* 30:1 (2006), 21-41.
37. McChesney 2004 at 259-260.
38. Michael Powell, "Willful Denial and First Amendment Jurisprudence" Remarks before the Media Institute, Washington, D.C., April 22, 1998, http://www.fcc.gov/Speeches/ Powell/spmkp808.html (accessed September 28, 2005).
39. For instance, see Robert B. Horwitz, *The Irony of Regulatory Reform: The Deregulation of American Telecommunications*, (New York, NY: Oxford Univer-

sity Press, 1989); Edward S. Herman, "Market System Constraints on Freedom of Expression," *Journal of Communication Inquiry* 15:1, 45-53 (1991); and Cooper.

40. See Eileen Meehan, Vincent Mosco, and Janet Wasko, "Rethinking Political Economy: Change and Continuity," *Journal of Communication* 43:4 (1993), 108.
41. Golding and Murdock 1996 at 14.
42. Cooper at 224.
43. Vincent Mosco, *The Political Economy of Communication* (Thousand Oaks, CA: Sage Publications, 1996), 90-91.
44. Vincent Mosco, *The Pay-per Society: Computers and Communication in the Information Age* (Norwood, NJ: Ablex, 1989).
45. Kevin Wilson, "Deregulating Telecommunications and the Problem of Natural Monopoly: A Critique of Economics in Telecommunications Policy," *Media, Culture and Society* 14 (1992), 343-368.
46. Mosco 1996 at 91.
47. Meehan, Mosco and Wasko at 114.
48. *Sinclair Broadcast Group, Inc. v. F.C.C.*, 284 F.3d 148 (2002).
49. *Ruggiero v. F.C.C.*, 317 F.3d 239 (2003).
50. *Time Warner Entertainment Co., L.P. v. F.C.C.,* 240 F.3d 1126 (2001).
51. *Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666 (1998).
52. *BellSouth Corp. v. F.C.C.,* 144 F.3d 58 (1998).
53. *Cellco Partnership v. F.C.C.,* 357 F.3d 88 (2004).
54. Meehan, Mosco and Wasko at 112.
55. *Fox Television Stations, Inc .et al. v. F.C.C.,* 280 F.3d 1027 at 1042 (2002).
56. *F.C.C. v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).
57. *Fox Television Stations, Inc. v. F.C.C.,* 280 F.3d 1027 at 1047 (2002).
58. *Sinclair Broadcast Group, Inc. v. F.C.C.,* 284 F.3d 148 at 168 (2002).
59. Id at 168.
60. Id at 168.
61. Id at 172.
62. See Powell.
63. *Prometheus Radio Project v. F.C.C.,* 373 F.3d 372 at 435 (2004).
64. Id at 401.
65. Id at 402.
66. Id at 437.
67. S.M. Shapiro, "Certiorari Practice: The Supreme Court's Shrinking Docket" (1999), http://www.appellate.net/articles/ certpractice.asp (accessed September 29, 2005).
68. Center for Digital Democracy, "Supreme Court Nominee John G. Roberts' Views on Media Ownership and Telecom Policy Must Be Raised by Senate: Roberts' Role in Controversial Fox TV Case Aligns Him with Big Media Lobby's Consolidation Goals" (2005, August 1), http:// www.democraticmedia.org/news/JudgeRoberts.html (accessed October 30, 2005).
69. See the financial disclosure statement provided by the Center for Investigative

Reporting (2005), http://courtinginfluence.net/nominee_print.php?nominee_id=55 (accessed October 30, 2005).

70. Center for Digital Democracy.
71. *Associated Press v. U.S.*, 326 U.S. 1 at 20 (1945).
72. See Maria Simone and Jan Fernback. "Invisible Hand or Public Spheres? Theoretical Foundations for U.S. Broadcast Policy," *Communication Law & Policy* 11:1 (2006), 305; and James Carey, "The Press, Public Opinion, and Public Discourse," in *Public Opinion and the Communication of Consent*, eds. Theodore Glasser and Charles Salmon (New York, NY: The Guilford Press, 1995), 382-383.
73. Simone and Fernback at 305.
74. Oscar Gandy, "The Political Economy Approach: A Critical Challenge," *Journal of Media Economics* 5:2 (1992), 27.
75. Theodore Glasser, "Competition and Diversity Among Radio Formats: Legal and Structural Issues," *Mass Communication Review Yearbook* 5, eds. Michael Gurevitch and Mark R. Levy (1985), 280.

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